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September 15, 1998

VIA HAND DELIVERY

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Chief, Commercial Wireless Division
2100 M Street, N.W.
Room 7023
Washington, D.C. 20554

Re: CC Docket No. 98-141

Ladies and Gentlemen:

Please find for filing in connection with the above-referenced matter the enclosed Petition to Deny. Thank you for your attention to this matter.

No. of Copies rec'd 0+12
List ABCDE

Very truly yours,

ROSS, DIXON & MASBACK, L.L.P.

By _____
Jeffrey J. Ward

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

Application for Commission Consent to Transfer of Control of	)	
AMERITECH CORPORATION	)	CC Docket No. 98-141
to	)	
SBC COMMUNICATIONS, INC.	)	

Summary of Petition to Deny

SBC is a company that has refused to comply with Commission orders requiring its local exchange carrier ("LEC") subsidiaries and other LECs to rebate overcharges amounting to hundreds of millions of dollars. These overcharges date back to 1986, took place over a 6-1/2 year period until 1993, and were imposed upon hundreds of resellers of 800 service. SBC has been repeatedly held by the Commission and the United States Court of Appeals for the District of Columbia Circuit to be liable to these resellers. As a result of its substantial and prolonged defiance of the Commission's orders, SBC lacks the character qualifications that it must establish as a precondition for grant of the major authorization it seeks to enhance substantially its degree of control over access to a major percentage of the country.

The Commission has entered multiple orders declaring SBC's conduct to be illegal. It still refuses to refund the illegal overcharges it collected. There is no more sensitive part of the Commission's regulatory program than its regulation of access charges. By refusing to disgorge overcharges held for up to twelve years, SBC is demonstrating that it can nullify the Commission's program in the crudest and most legally inexcusable way.

In the past, the Commission has found that other carriers have lacked requisite character qualifications for violations much smaller, less long-lasting, less defiant of specific Commission orders and without the same large adverse impact on other carriers. It should deny SBC's application.

Table of Contents

Exhibits

No. 1 - Affidavit of Victor J. Toth

No. 2 – Excerpts from Joint Reply Brief of Local Exchange Carrier Petitioners and Intervenors, filed before the United States Court of Appeals for the District of Columbia Circuit

No. 3 - Transcript of Proceedings in the United States Court of Appeals for the District of Columbia Circuit of May 14, 1997 in Southwestern Bell Tel. Co. v. FCC

Before the
Federal Communications Commission
Washington, D.C. 20554

Application for Commission Consent to Transfer of Control of	)	
AMERITECH CORPORATION	)	CC Docket No. 98-141
to	)	
SBC COMMUNICATIONS, INC.	)	

PETITION TO DENY

Total-Tel USA Communications, Inc. and Telemarketing Investments, Inc. (hereinafter "800 Resale Carriers"), pursuant to Section 309 of the Communications Act of 1934, hereby petition the Commission to deny the above-referenced application requesting Commission approval of the transfer of control to SBC Communications, Inc. (referred to, together with the subsidiaries operating under its umbrella, as "SBC") of licenses and authorizations controlled or requested by Ameritech Corporation or its affiliates or subsidiaries (cumulatively "Ameritech").

As explained below, SBC has acted, and remains to this day, in violation of Commission orders dating back some 11 years. These orders, which have been affirmed by the United States Court of Appeals for the District of Columbia Circuit, held that SBC and other local exchange carriers ("LECs") have illegally retained overcharges in violation of the Communications Act of 1934 and direct SBC and its allies to arrange for the provision of reparations to the affected resellers of 800 service for overcharges back to June 1, 1986. SBC's refusal to comply with these orders cannot be reconciled with the statutory requirement to establish character qualifications – a requirement upon which

SBC's instant application before the Commission depends. Unless and until SBC complies fully with the Commission's orders, it is not legally qualified to receive the authorization it seeks.

A. Substantial, Prolonged and Continuing Violations of the Commission's Rules Prevents a Finding of the Requisite Character Qualifications

The Commission is being asked to make a determination under Section 310(d) of the Communications Act that the "public interest, convenience and necessity will be served" and the proposed transferee meets the requirements for an applicant under Section 308. Section 308 requires inquiry, among other matters, into the applicant's character qualifications. "A licensee must have certain requisite qualifications to operate a facility in the public interest pursuant to Section 309 of the Communications Act, including character qualifications." Bell Atlantic Mobile Systems, Inc., 10 FCC Rcd. 13368, 13379 (Com. Car. Bur. 1995). "The Communications Act of 1934, as amended, not only allows, but unequivocally requires the Commission to consider an applicant's character." Lebanon Valley Radio, Inc. v. FCC, 503 F.2d 196, 200 (D.C. Cir. 1974). See also JAJ Cellular v. FCC, 54 F.3d 834, 840 (D.C. Cir. 1995) ("[c]haracter qualifications are *always* a relevant consideration in the award of a license, not because we say so, but because Congress has definitively said so") (emphasis in original).

There can be no more fundamental manifestation of the lack of requisite character qualifications than a refusal to comply with the Commission's own determinations of an applicant's violations of the Communications Act. The Commission has determined that any violation of the Communications Act, Commission rules or Commission policies can

be said to have a potential bearing on character qualifications.[1] Even in the absence of a prior final adjudication of violations of its rules, the Commission has made a carrier renewal applicant bear the burden of proving in evidentiary hearing that its charges to other carriers are *not* "in violation of any rule, decision, or policy of the Federal Communications Commission." United Telephone Co. of Ohio, 26 FCC 2d 417, 422 (1970). Of particular importance, are matters that "are predictive of licensee behavior and directly relevant to the Commission's regulatory activities."[2]

Violations of the extremely sensitive regulations by which the Commission has set access charges, are, thus, especially telling. They bear upon the single most important problem in the Commission's efforts to effectuate the Congressional policy to encourage

---

[1] A.S.D. Answer Service, Inc., 1 FCC Rcd. 753, 754 (1986), modified, 3 FCC Rcd. 4213 (1988), aff'd sub nom Mobilfone of Northeastern Pennsylvania, Inc. v. FCC, 1989 U.S. App. LEXIS 18686 (D.C. Cir. Nov. 29, 1989), reh'g denied, 1990 U.S. App. LEXIS 3982 (D.C. Cir. March 6, 1990); Western Telecommunications, Inc., 3 FCC Rcd. 6405, 6406 n.11 (1988); TeleSTAR, Inc., 2 FCC Rcd. 5 (Rev. Bd. 1987), aff'd, 3 FCC Rcd. 2860 (1988), aff'd by judgment sub nom TeleSTAR, Inc. v. FCC, 886 F.2d 442 (1989) (Table), cert. denied, 498 U.S. 812 (1990); Pass Word, Inc., 76 FCC 2d 465 (1980), recon. denied, 86 FCC 2d 437 (1981), aff'd per curiam sub nom Pass Word, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir. 1982), cert. denied, 459 U.S. 840 (1982); MCI Telecommunications Corp, 3 FCC Rcd. 509, 512 n.14 (1988), supplemented, 4 FCC Rcd. 7299 (1988), appeal dismissed by judgment sub nom TeleSTAR, Inc. v. FCC, 901 F.2d 1131 (D.C. Cir. 1990) (Table); Virginia RSA 6 Cellular Limited Partnership, 6 FCC Rcd. 405, 407 n.14 (1991); Big Country Communications, 5 FCC Rcd. 6013, 6014 (Com. Car. Bur. 1990); Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, 5 FCC Rcd. 5593, 5595 n.14 (1990); The Telephone Co., 65 FCC 2d 605 (1977); Beehive Telephone Co., Inc., 79 FCC 2d 354 (1980).

[2] Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1209 (1986), recon. denied, 1 FCC Rcd. 421 (1986), appeal dismissed sub. nom., National Assoc. of Better Broadcasting v. FCC, No 86-1179 (D.C. Cir., June 11, 1987) ("Policy Regarding Character Qualifications"). Because the same provisions of the Communications Act govern both common carrier transfers and broadcast qualifications, broadcast standards are useful in assessing common carrier applications. In Rhys G. Mussman, 3 FCC Rcd. 6808, 6810 (Com. Car. Bur. 1988), for example, the Bureau noted that a licensee's integrity "is as essential to common carrier applications and reports as it is to those of broadcasters" and set for hearing a cellular application to determine whether the applicant had failed to comply with an outstanding Commission order.

the development of fully competitive telecommunications markets. The credibility and enforceability of the access charge regulations on which the Commission has devoted so much of its time and energy over the last generation are critical to achieving the Commission's major policy goal of developing a fully competitive market in the future. Unilateral nullification of the Commission's regulations by local exchange carriers is completely beyond the pale of conduct that can be tolerated.

The existence of continuing violations is the most telling of all. The Commission declared in Tempo Satellite, Inc., 7 FCC Rcd. 2728, 2729 (1992), that:

> When an applicant's character qualifications have been called into question due to its adjudged violation of specific laws, the Commission will consider the following factors: (1) the willfulness of the misconduct; (2) the frequency of the offending behavior; (3) the time elapsed since the violation took place; (4) the seriousness of the conduct; (5) the nature of the participation, if any, of managers and owners; (6) the efforts made to remedy or avoid the wrongdoing; and (7) the applicant's record of compliance with the Commission's rules and policies.

Continuing violations lasting many years and in defiance of repeated Commission and court orders clearly meet the Commission criteria for according a violation the maximum weight of willfulness, frequency and currency. Policy Regarding Character Qualifications, 102 FCC 2d at 1228. Needless to say, such conduct also warrants the strongest action under the Commission's recognition that a major factor must be "the efforts made to remedy the wrong." Id.

B. SBC Has Been Repeatedly Determined to Be Unlawfully Withholding Overcharges

The petitioners here, or their predecessors in interest, are interexchange carriers ("IXCs") that resold 800 long distance telephone service. In the time period when the subject violations occurred, resellers purchased traditional 800 service from ubiquitous "facilities-based IXCs" -- companies like AT&T -- and then resold it to their customers

as a component of new or repackaged products. See Long Distance/USA v. Bell Tel. Co., 10 FCC Rcd. 1634 (1995) ("1995 FCC Order") ¶ 5, aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997).

SBC, Ameritech and other LECs were found to have violated the Commission's 800 Readyline Orders[3] and Sections 69.105 and 69.207 of the Commission's rules first by collecting two high CCL charges on reseller's 800 calls, and then by refusing to devise, either at the outset, or at any subsequent time, a system whereby these overcharges could be returned to resellers. Since 1986, the total unreturned CCL overcharges amount to hundreds of millions of dollars.[4] The Commission reached the identical conclusion on the identical issue no less than seven times between 1991 and 1996 -- three times in LD/USA,[5] three times in Teleconnect,[6] and once again in International Telecharge, Inc.[7] See Toth Aff. (attached Ex. 1), ¶¶ 6-10.

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[3] See AT&T Communications; Revisions to Tariff No. 2 (800 ReadyLine Service), 2 FCC Rcd. 5939 (Com. Car. Bur. 1987) (the "800 ReadyLine Clarification Order"); AT&T Communications; Revisions to Tariff No. 2 (800 ReadyLine Order), 2 FCC Rcd. 78 (Com. Car. Bur. 1986).

[4] See Affidavit of Victor J. Toth, attached here as Exhibit 1.

[5] Long Distance/USA, et al. v. Bell Telephone Company of Pennsylvania, et al., 7 FCC Rcd. 408 (Com. Car. Bur. 1992); Long Distance/USA, et al. v. Bell Telephone Company of Pennsylvania, et al., 10 FCC Rcd. 1634 (1995); Long Distance/USA, et al. v. Illinois Bell Telephone Co., et al., 11 FCC Rcd. 1835 (Com. Car. Bur. Enforcement Div. 1996).

[6] Teleconnect Company v. Bell Telephone Company of Pennsylvania, et al., 6 FCC Rcd. 5202 (Com. Car. Bur. 1991); Teleconnect Company v. Bell Telephone Company of Pennsylvania, et al., 10 FCC Rcd. 1626 (1995); Teleconnect Company v. The Bell Telephone Company of Pennsylvania, et al., 11 FCC Rcd. 1837 (Com. Car. Bur. Enforcement Div. 1996).

[7] International Telecharge, Inc. v. Southwestern Bell Telephone Company, 11 FCC Rcd. 10061 (1996).

Nevertheless, SBC argued before the United States Court of Appeals for the District of Columbia Circuit for the eighth time that, although it and other LECs had collected hundreds of millions of dollars in CCL charges to which they were not entitled, they should not be made to disgorge it to the resellers. As defendants themselves noted in petitioning the District of Columbia Circuit, the FCC found that defendants "are liable to the resellers for damages for violating the Communications Act."[8] Recognizing that common sense establishes that each of the various local exchange carriers received overcharges by virtue of calls made all over the country, the Commission ruled that the damages defendants owe to all of the resellers would and should be based upon a formula or, as the FCC put it, "surrogate," involving, for example, defendants' market share.[9]

At oral argument, the District of Columbia Circuit observed:

> As I understand it, the FCC's proposition is that the higher charge for this sort should not be made at both ends. Okay. And I thought that you had accepted that proposition. If so, then your clients are required to, it seems legitimate, for your clients to disgorge the excess.[10]

The court admonished that defendants "could have run down and paid the money" they overcharged "into [the district] court."[11]

During this same oral argument, SBC's counsel explained to the court the seriousness of the violations the Commission had found:

---

[8] Joint Reply Brief of Local Exchange Carrier Petitioners and Intervenors, at 18-19, excerpts set forth as Exhibit 2. See also Transcript of Proceedings In the United States Court of Appeals for the District of Columbia Circuit at 4, set forth as Exhibit 3; 1995 FCC Order, ¶¶ 19-27.

[9] 1995 FCC Order, ¶ 25 & n.69.

[10] Transcript of Proceedings In the United States Court of Appeals for the District of Columbia Circuit (Exhibit 3 hereto), at 14 (emphasis added).

[11] Id. at 16.

> THE COURT: In your brief you do express concern about the characterization of your clients as lawbreakers or violators. Does that have any tangible significance?
>
> MR. MCKENNA [for SBC]: Yes, Your Honor, it does. The court has held on a variety of occasions, you know, an adjudication [of] having violated the Communications Act begin[s] to play in such things as radio licenses, common carrier licenses, presumably, although I hope not. [I]t could affect those who are [in that] box. which would be US West, Southwestern Bell, BellSouth.[12]

Having heard the oral argument, the District of Columbia Circuit upheld the Commission's position in every respect. Southwestern Bell Telephone Co. v FCC, 116 F.3d 593 (D.C. Cir. 1997). Indeed, it ruled that SBC's argument that it was acceptable for it to hold overcharges so long as the charge was, in the initial instance, assessed against AT&T, "borders on the frivolous." Id. at 598.

C. SBC's Defiance of the Commission and the Court of Appeals Continues

None of these events -- not the FCC's seven rulings, nor SBC's own representations to the District of Columbia Circuit about the fact and seriousness of its violations of the Communications Act, nor the court's admonitions that SBC was obliged to "disgorge the excess," nor even the District of Columbia Circuit's ruling -- however, has led SBC to refund the ill-gotten gains, or even to consider a formula to do so. Long Distance/USA, Inc. v. Southern Bell Telephone and Telegraph Co., Civil No. 88-1477 (D.D.C.), is the ten-year-old litigation now reopened because of the refusal of SBC and other LECs to comply with these orders. In that litigation, SBC is actually asserting that, notwithstanding eight orders of the Commission and the District of Columbia Circuit, it has not done anything unlawful, and that they, carriers who are supposedly responsible to

[12] Id. at 10-11.

exist for the public good, have a right to retain illegal overcharges until and unless each and every reseller reconstructs each and every call made during a 6-1/2 year period that ended five years ago. The effect of SBC's position now, as it has been for 11 years, is to use the extraordinary economic power it now seeks to increase through this merger to defy this Commission, the courts and every reasonable effort to get them to give up ill-gotten gains to which they were never entitled.

D. SBC's Continuing Misconduct Is Grave and Particularly Detrimental to the Commission's Regulatory Program

SBC lacks the requisite character qualifications. Obedience to the Commission's orders is a sine qua non for any reliance on the assumption that the future conduct of companies possessing monopoly power can be restrained. SBC, however, has not only violated the requirements of the Communications Act, but even after a final determination by the Commission, upheld by the United States Court of Appeals for the District of Columbia Circuit, that it has effectively overcharged resellers, it continues to refuse to remedy its established violations of law. Thus, SBC's conduct shows that it cannot be counted on to abide by the Commission's rulings.

The amounts due in reparation being unlawfully withheld by SBC and its allies amount to hundreds of millions of dollars. These overcharges were especially substantial because they were largely exacted from small carriers struggling with very modest financial margins in their attempt to compete with their underlying supplier in the market for 800-based services. The extraordinary length of time over which these funds have been withheld is particularly disturbing. It has been twelve years. There is no ambiguity in the unlawfulness of SBC's withholding. The Commission, after repeated

reconsideration, has ruled definitively and finally that SBC has acted unlawfully and the Commission's ruling has been strongly affirmed by the Court of Appeals.[13]

If SBC cannot be counted on to satisfy a Commission's unequivocal determination to pay what it has been told it owes, how can the Commission reasonably expect it to live up to any conditions that the FCC might attach to the proposed merger? Other parties are likely to raise important questions on the prospective effects of these mergers on development of the marketplace. SBC's obdurate refusal to make good for already determined misconduct, however, is a particularly flagrant abuse of its already great economic power and a substantial signal as to the type of conduct that it will display with the even greater economic power resulting from the proposed mergers. The fact that the unlawful action taken by SBC was directed against intercity carriers takes on even greater importance in light of SBC's repeated public pronouncements of its intent to enter the intercity field as a direct competitor of existing intercity carriers. We must presume its increasingly strong efforts to compete against the victims of its past overcharges makes the hazard of repetitions of such misconduct in the future all the more acute.

Moreover, the fact that it can get away with defying the Commission's pronouncements for such an extraordinarily long period of time makes it quite evident that the preservation of a genuinely competitive industry cannot rely merely upon corrective rate orders that may only be defied indefinitely, either until the obligations are forgotten, or until the original victims have all expired. Even if and when genuine compensatory damages are recovered, active carriers such as Total-Tel USA Communi-

[13] In addition to the overcharges themselves, the interest accumulated on such a principal over so many years manifests a serious lack of prudence by SBC's management towards the obligations owed to other ratepayers and to investors.

cations, will continue to suffer the effect of the original injury. In addition to having been prevented from competing most effectively during the period prior to recovery, it also must face, in the aftermath of its greatly delayed recovery, the fact that SBC has demonstrated its power and readiness to use it to make the Commission's rate orders a bad joke any time it chooses to do so again in the future. The ability to forestall payment of reparations for more than a decade, if not indefinitely, after the fact is an invitation to a lawbreaker to disregard the Commission's rules and orders again and again.

After demonstrating that it can break the Commission's access charge rules and essentially get away with it, a carrier like SBC with a publicly announced objective to compete for long-distance business has all the incentive in the world to cripple present or future competitors. Even successful enforcement of the remedy of paying its unlawfully held charges more than a decade later to its competitors' successors in interest would not, by itself, be adequate deterrence from doing it again. It held the money during the critical phase of developing competition and the damage done to competition will have taken place irrevocably regardless of ultimate disgorgement.

The industry simply cannot work under this pattern of behavior by a highly dominant local exchange giant like SBC. If such protracted misconduct is tolerated, the Commission's access charge program will quickly be recognized as worthless. Some form of structural relief is needed to halt such naked disregard for the Commission's authority. The Commission should not permit SBC to become even stronger, and thus even more defiant, until it behaves like a responsible regulated carrier.

E. SBC's Conduct is Substantially Worse and More Damaging to the Commission's Regulatory Program Than the Conduct of Other Carriers the Commission Has Found Lack Requisite Character Qualifications

SBC's violations are especially telling when compared to the circumstances that have led the Commission to deny approval to other applications. As discussed in Section A, above, the Commission considers violations of its carriers in light of the following factors: (a) the willfulness, frequency, currency, and seriousness of the misconduct; (b) involvement by managers and owners; (c) remedial efforts; (d) past record of compliance; (e) deterrence; (f) and whether the licensee can "show the ability to operate in the public interest with no likelihood of future misconduct." David A. Bayer, 7 FCC Rcd. 5054, 5056 (1992).[14] Here, SBC has come to the Commission with a long history of violation of specific and substantial FCC orders – a history that belies the fundamental representation it makes by filing its application that it possesses the character required by the Act.[15]

Other common carriers have been found unqualified and denied authorization for violations far less substantial, less frequent, less current, less predictive of future behavior, and less critical to carrying out the Commission's common carrier regulatory program. In Pass Word,[16] for example, a carrier and its young principal, Mr. Bacon, were

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[14] In that case, the Commission permitted Ameritech to acquire CyberTel upon the payment of a $505,005 forfeiture for operating a cellular antenna without the required reflector.

[15] SBC's lack of candor may not even be limited to this agency. SBC has also failed to disclose its liability to the resale carriers in its June 5, 1998 Form S-4 filed with the Securities and Exchange Commission.

[16] Pass Word, Inc., 76 FCC 2d 465 (1980), recon. denied, 86 FCC 2d 437 (1981), aff'd per curiam sub nom Pass Word, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir. 1982), cert. denied, 459 U.S. 840 (1982).

found unqualified to receive new authorizations and had their existing authorizations revoked merely because of misrepresentations concerning progress in building a single mobile station in Idaho. He disobeyed no specific order of the Commission, committed no continuing misdeed, and did not injure any other licensees.

In TeleSTAR,[17] an applicant for carrier authorizations was found unqualified on account of premature construction of microwave stations and a lack of full candor with the Commission. See also, e.g., The Telephone Company, Inc., 65 FCC 2d 605 (1977); Beehive Telephone Co., Inc., 79 FCC 2d 354 (1980); and Liberty Cable Co., 13 FCC Rcd. 10716 (ALJ 1998) (involving similar denials, in the first two cases, of radio licenses and, in the last, of microwave authorizations).

In A.S.D. Answering Service,[18] a huge communications company (Graphic Scanning) was allowed to stay in business only after it entered into a settlement agreement that removed its management, dismissed a number of applications and surrendered numerous authorizations. Yet, the danger imposed by its misconduct (failing to acknowledge the real party in interest), is not nearly as great as SBC's contravention of a crucial area of the Commission's regulatory program through violations of specific orders over an 11-year period.

In sum, the Commission has a right to expect that, when it tells a telecommunications carrier in 1987 to arrange for the provision of reparation for overcharges it has

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[17] TeleSTAR, Inc., 2 FCC Rcd. 5 (Rev. Bd. 1987), aff'd, 3 FCC Rcd. 2860 (1988), aff'd by judgment sub nom TeleSTAR, Inc. v. FCC, 886 F.2d 442 (1989) (Table), cert. denied, 498 U.S. 812 (1990).

[18] A.S.D. Answer Service, Inc., 1 FCC Rcd. 753, 754 (1986) modified, 3 FCC Rcd. 4213 (1988), aff'd sub nom Mobilfone of Northeastern Pennsylvania, Inc. v. FCC, 1989 U.S. App. LEXIS 18686 (D.C. Cir. Nov. 29, 1989), reh'g denied, 1990 U.S. App. LEXIS 3982 (D.C. Cir. March 6, 1990).

made, the carrier will do so -- without the need for further orders, much less in defiance of them. A carrier that refuses to make any attempt to correct its already established violations of the Communications Act should expect to receive no Commission authorization to increase its power.

CONCLUSION

Accordingly, the application of SBC should be denied.

Respectfully submitted,

ROSS, DIXON & MASBACK, L.L.P.

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Attorneys for the 800 Resale Carriers

Dated: September 15, 1998

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of September, 1998, that true copies of the foregoing Petition to Deny was served by hand upon the following:

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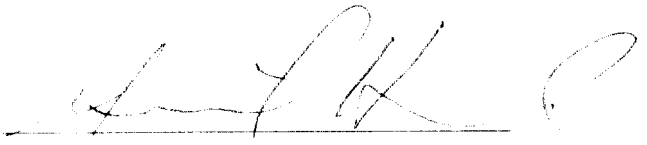

Before the
Federal Communications Commission
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Application for Commission Consent to Transfer of Control of	)	
AMERITECH CORPORATION	)	CC Docket No. 98-141
to	)	
SBC COMMUNICATIONS, INC.	)	

AFFIDAVIT OF VICTOR J. TOTH IN SUPPORT OF PETITION TO DENY APPLICATION OF SBC COMMUNICATIONS

I, VICTOR J. TOTH, having been duly sworn, hereby state as follows:

1. I am a member of the Bar of the District of Columbia, and a sole practitioner, practicing under the Law Offices of Victor J. Toth, P.C. I have been practicing law in the communications field since 1973.

2. Beginning in 1973-74, my practice focused on promoting the concept of long distance resale and the representation of resellers, later including resellers of 800 service. As the Commission is well aware, switch-based resellers purchase some or all of their underlying bulk long distance capacity from facilities-based carriers like AT&T, convert it into retail products and services, and resell these to the public. This simple formula has served successfully the competitive interexchange industry, big and small, as well as the Commission's pro-competitive policies from the late-seventies to the present. Its beneficiaries include relatively small regional companies, like the former Telemarketing Investments, to large companies, like WorldCom, Frontier, and MCI. At least since 1983, resellers were purchasing AT&T's conventional 800

service and reselling it as a travel call convenience or a low budget 800 product for smaller businesses.

3. Effective June 1, 1986, the Commission adopted a bifurcated carrier common line ("CCL") charge plan, which required a lower access charge at the originating end of a long distance call, as long as the call used the switched access service of a local exchange carrier ("LEC") at both ends of the call (i.e., had two "open ends"). Initially, the LECs, including Southwestern Bell, PacTel, Nevada Bell, and Southern New England Telephone, subsidiaries that currently function under the umbrella of SBC Communications, Inc. (collectively "SBC"), refused to apply the new bifurcated access charge scheme to new, non-conventional forms of 800 calls. In 1987, however, the Commission confirmed that all calls that have two open ends, including new forms of 800 products, were to be assessed only one higher CCL charge on the terminating end and one lower CCL charge on the originating end. The Commission directed NECA to file tariff provisions that would implement an administrative process for reconciling CCL credits on eligible 800 services in the future, and it directed the LECs, including SBC, to apply such tariff provisions prospectively and rebate all CCL overcharges collected on eligible services, retroactive to June 1, 1986. See In the Matter of AT&T Communications; Revisions to Tariff No. 2 (800 Readyline Service), 2 FCC Rcd. 5939 (Com. Car. Bur. 1987) (the "800 Readyline Clarification Order").

4. SBC and the other LECs, however, refused either to develop this administrative process, or to rebate the overcharges. Instead, for a period of some 6-1/2 years -- from June 1, 1986, when the bifurcated CCL tariff regime took effect, until 1993, when the differential between high and low end charges essentially disappeared -- the LEC industry, including those operated by SBC, exacted hundreds of millions of dollars worth of overcharges that they have

never returned. For small resellers, in particular, this difference of up to 4.33 cents per minute on every call constituted all or a major part of their profit margin on the affected products. For resellers taken as a whole, the overcharge totaled hundreds of millions of dollars.

5. The LECs' refusal to apply the Commission's CCL policies to resellers not only resulted in the LECs' unlawful retention of hundreds of millions of dollars, it also placed resellers at a severe competitive disadvantage. Resellers had been selling eligible 800 products with two open ends well before the June 1, 1986 effective date of the Commission's bifurcated CCL rule modification, whereas AT&T did not offer its 800 Readyline product until December 1986. At the time of the Readyline Order, resellers were 100 percent dependent on AT&T, their principal competitor, for underlying 800 capacity. Consequently, it was vital to the resellers that the Commission's CCL policies be applied to emerging 800 services evenly as between resellers and AT&T just to maintain parity with their sole supplier. The LECs' extension of the CCL credit only to AT&T and later to MCI, Sprint and a few other facilities-based interexchange carriers, and its denial to resellers thus placed resellers at a distinct disadvantage.

6. Soon after the 800 Readyline Clarification Order, I attempted to work with NECA and the LECs, both directly and through my clients, to obtain the CCL credits that the Commission had ordered. NECA and the LECs, however, rebuffed our efforts, declaring that 800 resellers would not receive the proper CCL treatment going forward, and would not receive the retroactive rebates either. Consequently, I filed suit in the United States District Court for the District of Columbia on behalf of Total-Tel USA Communications, Inc., Telemarketing Investments, Ltd., and other resellers, on behalf of all resellers similarly situated, in order to obtain the CCL rebates and the CCL credit mechanism ordered by the Commission.

7. The resulting lawsuit, Long Distance/USA, Inc. *et al.* vs. Southwestern Bell, *et al.*, Civil No. 88-1477, was filed in the United States District Court for the District of Columbia over ten years ago. Many of those years have been spent before this Commission pursuant to a primary jurisdiction referral by the District Court.

8. Before the Common Carrier Bureau, SBC and the other LECs initially denied levying unlawful charges, claimed refunds were not warranted, and argued that resellers' 800 services were not subject to the 800 Readyline Clarification Order. See In the Matter of Long Distance/USA, Inc. v. The Bell Tel. Co., 7 FCC Rcd. 408 (Com. Car. Bur. 1992). The Common Carrier Bureau rejected the LEC's arguments, finding that their refusal to rebate the CCL overcharges violated the Communications Act and the specific command of the 800 Readyline Clarification Order not to charge two higher CCL charges. See id.

9. The LECs then appealed to the full Commission. By this time, several of the LECs acknowledged that originating LECs charged a higher CCL charge to which they were not entitled. Nevertheless, every LEC continued to argue in some manner that the Bureau improperly imposed liability on them. The Commission rejected these arguments, and found that, "given that the [resellers] were unlawfully assessed a second higher CCL charge, we must now determine on whom to place liability for the overcharges." In the Matter of Long/Distance USA v. The Bell Tel. Co., 10 FCC Rcd. 1634, ¶ 22 (1995) ("1995 FCC Order"). The Commission concluded that the LECs, "in their roles as originating local exchange carriers, unlawfully assessed the higher carrier common line charge on the originating end of the [resellers'] 800 services." 1995 FCC Order, ¶ 22. It further concluded that, because it would not be possible to associate a LEC point of origination with each 800 call minute, "the parties would have to develop a surrogate to apportion liability." 1995 FCC Order, ¶ 25. The Commission